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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

VILLY DIERNISSE - PETITIONER

VS.

BUSINESS COMMUNICATIONS COMPANY, INC.

and LOUIS NATURMAN RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Is the Mediation Panel's decisions valid when:

a) It ruled contrary to the statutes of limitation?

b) It ruled on issues not part of the counterclaims?

c) It ruled on new issues and evidence not previously presented, and contrary to both parties consent in open court that the only issue was the "for hire" issue and with the new issues changing the thrust of the case?

d) It ruled contrary to the previous court ruling on the "for hire" issue, without any new claims or evidence?

e) Appellant's condition in agreeing to mediation had not been met?

f) It changed question No. 2 as agreed to by both parties before

the hearing?

g) It ruled contrary to the evidence introduced?

h) It departed far from the accepted and usual course of judicial proceedings?

i) Appellant was denied due process as guaranteed by the 14th Amendment to the U.S. Constitution?

2) May Appellees maintain the never before presented issue of joint ownership when it changes the thrust of the case?

a) If so; did Appellees' mutilations of Appellant's works constitute coauthorship or, did it constitute copyright infringement, slander and libel, unfair competition, and/or breach of thrust?

b) If Appelles were joint owners, did Appellant become the sole owner upon Appellees breaches of con-

tract and/or thrust?

3) May Appellees maintain a counter claim excluded under the statutes of limitation?

4) May Appelles maintain a counter-claim which they did not include in their Answer to Substituted Complaint?

5) Did Appellees' failure to account for and pay royalties on the first day of sales of both books, or their publication of derivatives of Appellant's works constitute copyright infringements, breach of contracts, slander and libel, unfair competition, and/or breach of trust?

6) Were Appellees' acts willful, malicious, in bad faith, and/or did they cause Appellant emotional distress?

7) Did Appellees engage in unfair

competition by advertising books competing with Appellant, and never publishing those books?

8) Did Appellees or Appellant breach the "Retort Pouch" contract?

9) Should the damages be determined in accordance with both parties uncontroverted evidence and testimony?

10) Should a previous ruling be adhered to if no new facts or points of law are introduced?

11) Did the courts below stray too far from the usual course of judicial proceedings in denying Appellant due process and in approving the Mediation Panel``s order.

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PETITION FOR WRIT OF CERTIORARI

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Petitioner, Villy Diernisse, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit granting Appellees' motion

to dismiss Appellant's appeal; and to review the judgements and opinions of the court below contrary to the statutes of limitation, allowing the thrust of the case to be changed with new issues, changing a previous ruling without new facts, of not ruling on the issues as presented, of ruling against the evidence and law, and in denying Appellant's rights to due process.

OPINIONS BELOW

All the opinions below are unpublished. The Order of the Court of Appeals denying Appellants Petition for a Review of Appellees' Motion for Dismissal appeals in Appendix J. The Order of the Court of Appeals granting Appellees' Motion for Dismissal appears in Appendix A. The Judgment of the District Court for the District of Conncticut appears in Appendix K. The Decision of Mediation Panel in the District Court for the

District of Connecticut appears in Appendix B. The Denial of Omnibus Motion by the District Court for the District of Connecticut appears in Appendix C. The Scheduling Order by the District Court for the District of Connecticut appears in Appendix D. The Omnibus Ruling by the District Court for the District of Connecticut appears in Appendix E. The Denial of Motion for Production of Evidence and Compliance with Oral Court Order by the District Court for the District of Connecticut appears in Appendix F. The Ruling of the District Court for the District of Connecticut appears in Appendix G. The Proposed Ruling on Motion for Preliminary Injunction by the District Court for the District of Connecticut appears as Appendix H. The Order of Preliminary Injunction by the District Court for the District of Connecticut appears as Appendix I.

JURISDICTION

The Court of Appeals Decision in this matter was filed on August 27, 1991. A timely petition for a review was filed on September 30, 1991. The Court of Appeals denial of the petition was issued on October 3, 1991; as set forth in Appendix K. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254 (1), and Title 17, U.S.C. § 501.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14 to the U.S. Constitution Title 17, U.S.C. §101, and Connecticut General Statutes § 52.576 (a) and § 52.581 (a), all as set forth in Statutes and Constitution in the Appendix.

STATEMENT OF THE CASE

The United States District Court, District of Connecticut had jurisdiction pursuant to Title 28 U.S.C. §'s 1331 and

1338 (a) and Title 17 U.S.C. § 501.

Appellant and Appellees entered into three separate, express and oral contracts in 1979 and 1980 whereby Appellees were to publish three books (P-049, Forming I; P-034R, Food Packaging; and P-060, Retort) which Appellant would write. The contracts were identical except the last one, Retort, which included $1.50 extra per page for finish typing.

When Appellant wanted to deliver the finished manuscript for Retort on November 26, 1980, Appellees wanted to reduce the price for typing to $1.35 per page, to save $29.55, and Appellant did not surrender the manuscript. Appellees then refused to pay royalties on the other two books which they continued to sell and make derivaties of (the contracts did not contain any provisions for derivatives). Appellant claims that P-079, Forming II; P-063, Changing Film; and P, Barrier

Coextruded and other of Appellees' books are derivaties infringing his works. According to Appellees' records furnished during discovery they breached the contract for Forming I on January 29, 1980 and for Food Packaging on July 31, 1980, by failing to account for and pay royalties on books sold on the first date of publication and subsequently.

An agreement in October of 1982 for Appellees to stop publishing Forming I and Food Packaging and pay a sum of money to Appellant was never consumated because Appellees subsequently wanted the copyrights assigned to them.

Further attempts by Appellant to resolve the matter failed, and he filed suit on January 25, 1984, alleging copyright infringements, breach of contract, disparagements, slander of title, unfair trade, economic loss and emotional distress. In their Answer, Affirmative

Defenses, and Counterclaims, filed February 14, 1984 Appellees denied the allegations and claimed Appellant was barred by the statute of limitations, estoppel, and laches; and the books were "works for hire." Appellees' counterclaim alleged breach of contract on the Retort. Appellant's substituted complaint of February 18, 1986 added Appellees' president, Mr. Naturman as a defendant. Appellees' Answer to Substituted Complaint, filed more than two years late on May 25, 1988, is radically different from their answer to the original complaint. It added that Appellant is also barred by the statutes of frauds and they dropped their counterclaim and claim for damages.

At a hearing for an injunction on August 8, 1985 Magistrate Thomas P. Smith considered all the evidence and heard everybody familiar with the matter. The Magistrate in his Proposed Ruling on

Motion for Preliminary Injunction, filed September 3, 1985 found that Appellant was an independent contractor vel non, and the books could not possibly be "works for hire" under the Aldon doctrine. The Supreme Court has subsequently ruled in Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166 (1989). that the Aldon doctrine is not relevant. The "for hire" issue under CCNV v. Reid is more favorable to Appellant than it is under the Aldon doctrine.

The parties at the same hearing stipulated on the record that the only factual issue in this matter is the "for hire" issue.

The proposed ruling by the Magistrate was approved by the District Court on September 25, 1985 and Appellees never objected to the injunction, but it was terminated three years later when Appellees motioned for a bond or termination

and Appellant did not have the financial means to post the bond.

In response to the Court Ruling of October 31, 1989 that they file their claim for damages, Appellees filed their claim for $7896.30 on November 7, 1989.

On January 19, 1990 Appellant agreed to binding arbitration, subject to five conditions, and Appellees agreed on January 30, 1990 to binding arbitration on Appellant's conditions.

On April 27, 1990 Appellant filed Motion for Production of Evidence and Compliance with Oral Court Order for Appellees to comply with Appellant's conditions for binding arbitration.

The Mediation Panel Order by the Court was filed on January 14, 1991.

Appellant's Motion of April 24, 1990 for Appellees to comply with Appellant's conditions for binding arbitration was denied on February 20, 1991.

On April 3, 1991 Appellees filed their Memorandum of law of Defendants for the Mediation Panel with the new issues, including their claim that Appelles were joint authors; and changing their claim of damages from $7,896.30 to $217,378.80.

On May 1, 1991 Appellant filed Omnibus motion, asking that Appellees not be permitted to introduce any new issues, for reconsideration of the Court's ruling of April 15, 1991 and dismissal of Appellees counterclaim, for an order precluding Appelles from changing their damage claim, and for permission of Appellant to claim damages under F.R.C.P. rules 11 and 28 and Title 28 U.S.C. § 1927. The Omnibus Motion was denied on May 14, 1991.

The Mediation Panel hearing occurred on May 21, and on June 20, 1991. At the later date Appellees introduced evidence not included in Defendants' Exhibits admitted on April 15, 1991.

The Decision of Mediation Panel was filed on June 20, and approved by the Court on June 26, 1991.

Appellant filed Notice of Appeal on July 30, 1991.

Appellees filed Motion to Dismiss Appeal on August 2, 1991, and this was approved on August 8, 1991.

On September 30, 1991 Appellant filed Petition for Reviev of Granting of Appellees' Motion for Dismissal. This was denied on October 3, 1991.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this petition presents issues resolved by this Court and contradicted by the courts below. The petition presents issues of contradictions of the courts below with decisions of other circuits as well as contradictions with decisions within their own circuit. The petition presents an issue of whether due process under the

Constitution has been given. The petition presents an issue of whether a mediation panel's decision is binding when a party's conditions for binding mediation have not been met, the terms of mediation is changed far beyond the original agreement, or the panel fails to consider the preponderance of evidence. The petition present an issue of whether new issues and evidence which change the thrust of the case may be introduced. The petition presents an issue of whether a defendant may present counterclaims not part of their answer to the complaint. The petition presents an issue of whether previously decided matters may be changed without new facts or points of law. The petition presents an issue of wheher the courts can rule contrary to the statutes without properly considering them. The petition presents issues of how far the courts can depart from the accepted and

usual course of judicial proceedings.

1) Certiorari Should be Granted Because the Mediation Panel's Decision is not Binding

Both Appellant and Appellees agreed to binding mediation (Appendixes M and N). Appellant on the condition that Appellees comply with all the outstanding items of the pretrial order, and furnish all the relevant evidence in their possession. None of this was ever done, and Appellant could not possibly prepare his case for mediation without them. The Court agreed at status meetings on December 18, 1989 and June 12, 1990 that the items should be produced, but on February 20, 1991 it denied Appellant's motion of April 27, 1990 (Appendix F) for production -- after the Mediation Panel Order had been issued on January 14, 1991. The denial was repeated at the hearing on April 15, at which time the Court also, over Appel-

lant's objection, limited the time to present the case-in-chief to two hours. On May 14, 1991 the Court denied Appellant's Omnibus Motion (Appendix C). It included requests that Appellees not be allowed to change the thrust of the case by introducing new issues or amend their damage claim, and dismissal of their counterclaim. Because Appellant has not been allowed access to most of Appellees's records he has been prejudiced. For instance, at the hearing before the Mediation Panel, Appellees claimed that the total income from sales of Appellant-079 was $24,725, and the expenses were $13,750. Appellees did not submit any proof, but the Panel accepted the figures because Appellant could not refute any of them.

Appellant has been denied due process. In Appellant's Pre-Trial Memorandum he estimated 7 days for the trial based on

the many issues and the large amount of evidence. The Court limited him to two hours and a memorandum of law of 15 pages It is impossibe to present the case fairly in that frame, especially in view of the many new issues raised by Appellees. (Appellees, with the Court's approval, was allowed to file a 21 page memorandum-in-chief to further disadvantage Appellant.) This is a very complicated case with 26 proposed issues in addition to four new and totally different issues introduced by Appellees. This allowed Appellant four minutes per issue plus two minutes for the rebuttal.

Important items which Appellant was not allowed to present, or only present partly include the joint author issue (a new issue), Appellees's claimed expenses for the infringing books, Appellees's tainted evidence, and Appellees's infringing acts in Forming I and Food

Packaging. However, there were many other issues where more time to present an accurate picture was needed. Issues such as slander of title, unfair competition, emotional distress, and Appellees's willful and malicious acts.

Appellant has been prejudiced because Appellees introduced new evidence, in violation of both the Court's Pre-trial Order and the Mediation Panel Order. Evidence which Appellant could have refuted by rebuttal evidence, if he had known of Appellees's new evidence.

The introduction of the new evidence and issues forced Appellant to use much of his limited time on them at the hearing -- to the detriment of the other issues.

The Courts have departed too far from the accepted and usual course of judicial proceedings,and Appellant has been denied due process of law as guaranteed by

section 1 of the 14th Amendment to the United States Constitution. The Panel would naturally reach the wrong conclusions when it was not presented with all the facts. It is the same as if a jury had reached a wrong decision based on the obvious evidence, erroneous instructions, or if one of the parties had not been permitted to present all the material facts. In this particular matter the Panel also reached wrong decisions based on the evidence introduced, as will be shown later. And just as in the case of a jury's verdict being overturned under those conditions, the same should be true here.

2) Certiorari Should be Granted Because the Counterclaim is Invalid.

It is undisputed that all the contracts were oral. Defendants' Interim Pre-Trial Memorandum of October 13, 1989 at 6:

"With respect to its counterclaim, BCC contends that by oral agreement, Plaintiff agreed to develop an additional work to be published by BCC under BCC´s corporate name,... ."

It is also undisputed that the Retort contract was breached on November 26, 1980 (Appendix P), when it was an executory contract with both parties still having to perform (Appellees had to do editing, publishing, promoting, selling, and pay money to Appellant; and Appellant had to deliver the manuscript, do editing, rewriting, and consult to customers). In Connecticut the Courts have held that the statute of limitation on executed, oral contracts is 6 years and on executory, oral contracts it is 3 years (Kennedy v. Johns Manville Sales Corp., 135 Conn. 176, 62 A.2d 771; Gorlin v. Bond Richman & Co., 706 F. Supp. 236 (S.D.N.Y. 1989)).Appellees´s Answer,

Affirmative Defenses and Counterclaims (Appendix Q) were filed on February 13, 1984 more than three years after the alledged breach.

Appellant filed a substituted complaint on February 18, 1986. More than two years later, on May 13, 1988, the Court ordered Appellees to file their answer (Appendix D), which they did on May 25, 1988 (Appendix O). Appellant maintains the Court abused its discretion by allowing Appellees to answer after such a long, unexcused delay.

Appellees's answer to the substituted complaint is radically different from their original answer and they chose not to make any counterclaims or claims for damages. In their Affirmative Defenses they did make a reference to incorporate their affirmative defenses from their previous answers, but not their counterclaim or claim for damages, and the words

"affirmative defenses" cannot possibly mean "counterclaim."

Appellant's motion for dismissal of the counterclaim was denied in the Omnibus Ruling of May 13, 1988 at 54 (Appendix E). The Court erred in applying C.G.S. § 52-576(a) which concerns written contracts, but as the Court acknowledged in its ruling at 17 and 23; this is an express, oral contract governed by C.G.S. § 52-581(a).

Appellant has continued to argue the point and in his motion of October 25, 1989 (Appendix J) asked for a reconsideration. At a status conference on October 30, 1989 the Court agreed with Appellant's position and issued a ruling on October 31, 1989 (Appendix G) to hold matters on the counterclaim in abeyance until Appellant identified the request for dismissal (Appellant's Second Motion for Contempt of March 19, 1987), which

was done in Appellant's Compliance with Ruling of October 31, 1989, of November 14, 1989 at 6:

> "4. Plaintiff's Document Requesting Dismissal of Counterclaim. Plaintiff requested dismissal of Defendants' Counterclaim on March 19, 1987 in his Second Motion of Contempt (Exhibits E to H). This motion included Exhibit I. Other parts of the record which supports the fact that this was an oral contract breached by Defendants more than three years before their filing of the counterclaim are Exhibits J and K. The last one is an admission by Defendants that the contract was oral."

The motion of October 25, 1989 was denied by Magistrate F. Owen Eagan on April 15, 1991, and an omnibus motion (Appendix C) which included a request for reconsideration was denied on May 14,

1991, when he claimed he could not overrule the original denial of May 13, 1988, and the Panel refused to consider the issue. Both the Court and the Panel abused their discretion. The original decision was an interim decision which is not binding when new facts are introduced, and the Panel's mandate was to rule on all issues of law and facts.

The counterclaim is invalid because:

a) It was filed after the three year statute of limitation.

b) The Court abused its discretion in ordering Appellees to file a late answer.

c) Appellees filed their answer to the substituted complaint unexcuseably more than two years late.

d) Appellees never filed a counterclaim as part of their answer to the substituted complaint, it is not part of any of their pleadings, it has not been filed to conform to the evidence, and it

has not been introduced with Appellant's express or implied permission.

e) The ruling of May 13, 1988 was an interim ruling, and both the Court and the Panel abused their discretion in not ruling on the issue again.

f) Appellees are estopped because they waited until Appellant was successful before filing their counterclaim.

Because the counterclaim is invalid, the decisions on Question Nos. 13, 14, 21, and 22 are also invalid.

3) Certiorari Should be Granted Because Appellees have Introduced New Issues.

Appellees filed a Memorandum of Law of Defendants for Mediation Panel on April 2, 1991 (Appendix R) wherein they introduced a number of new issues. The main one changed the thrust of their defense from being "works for hire" to joint authorship. Appellees have never raised

this issue in their answers to either the original or substituted complaint, in their numerous and voluminous pleadings, or in any of their arguments at the many hearings and status meetings. Appellant has never implicitly or expressly consented to include any new issue. And none of the new issues conforms to the evidence, all of it in Appellees's possession before they filed their answer to the substituted complaint. They are not permitted to introduce any new issues beyond the pleadings if those issues change the thrust of the case to prejudice Appellant (61 A Amer Jur 2d § 322), and the new issues do both. Appellant has no way of preparing his case with respect to them. The Court closed discovery two years ago, and, for instance, regarding the joint authorship issue, Appellant would among other things have to deposition Appellees and their former

editor to learn about their claimed contribution to the various books. The Court evidently also believed that the only issue was the "for hire" issue. It in its pre-trial order of August 23, 1989 ordered the parties to submit briefs on the impact of the Supreme Courts decision in Community for Creative Non-Violence v. Reid 109 id.

The parties stipulated in open court that the only issue was whether Appellant was an independent contractor (Proposed Ruling on Motion for Preliminary Injunction of September 3, 1985 at 63 (Appendix H). Ordered September 25, 1985 (Appendix I)), and if Appellant was such, then the books in issue could not be "works for hire" (Magistrate Smith determined that Appellant was an independent contractor vel non (Appendix H at 77, 79)). While this stipulation was for the purpose of determining whether a preliminary injunc-

tion was warranted, the other issues, including the joint author issue, would be of equal importance in determining the appropriateness of the injunction, and it is clear that Appellees is breaching their previous agreement that the only factual issue is the "for hire" issue.

While an interim decision is not binding at the trial on the merits, it should be adhered to unless new facts are presented or an error has been committed (Yonkers Raceway Inc. v. Standardbred Owners Association Inc. 21 F.R.D. 3 (S.D.N.Y. 1957)). There are no new facts or errors to warrant changing the thrust from a works "for hire" issue.

Appellees never appealed the injunction, or that the "for hire" issue was the only factual issue, and consequently cannot later question it. (Abeshouse v. Ultragraphics, Inc. 754 F.2d 467 (2d Cir. 1985)). Neither the joint author or any

of the other new issues were mentioned in their motion for a bond or termination.

As discussed above, Appellant tried to have the new issues dismissed.

The new issues should not have been ruled on because:

a) They have never been introduced in any pleading.

b) They change the thrust of the case to Appellant´s detriment.

c) Appellees have never motioned for them to be introduced.

d) Appellant has never consented to their introduction.

e) No new evidence or errors warrants their introduction.

f) They are not included in the parties consent of what the issues are.

h) Appellant has not been permitted to do any discovery related to them.

i) Appellant had no way of researching the issues on such short notice.

Each of these reasons warrants setting aside consideration of the new issues, and consequently the Panel's decisions as they relate to Question Nos. 1, 7a and 12 as they pertain to P-034R are improper. Also because it is uncontroverted that all of the contracts were identical as to who owned the copyrights, and P-034R was the only copyright decided on by any of the new issues, this copyright should have been granted to Appellant. In the alternative it should have been granted to Appellant because the "for hire" issue has been decided, and that decision should be adhered to (Yonkers Raceway Inc. v. Standardbred Assoc. Inc., id).

4) Certiorari Should Be Granted Because The Panel Erred And Abused Its Discretion In Its Decisions Of Specific Questions.

Question No. 1. Joint Ownership.

The decision that the copyright to P -034R is jointly owned is incorrect for a number of reasons.

The Panel abused its discretion in allowing a new issue to be introduced, in not permitting Appellant a full and fair opportunity to present his side of the issue, and in not striking, as requested, the joint authorship defense as inconsistent with the "for hire" defense (61 A Am. Jur.2d § 224).

The ownership should be determined under the "for hire" doctrine as ruled on by the Supreme Court in Community for Creative Non-Violence v. Reid id.

The "for hire" issue has been decided (Appendixes H and I), and although this was an interim decision it should be adhered to in the present case because no new facts or evidence of any errors have been presented (Yonkers Raceway v. Standardbred Owners Association id).

Both parties had stipulated on the record that the "for hire" issue was the only factual issue, and that is a final agreement which cannot be reneged on . The Panel erred in its consideration of both the law and facts on the joint author issue. Both authors must intend that their works be unified **before** either contribution (Nimmer on Copyright § 6.02) (Emphasis added), and there is no such intentions evidenced by any testimony or evidence. The evidence showed that Appellees did furnish a small of amount of research material , but Appellant never used any of it, and Appellees did not show a single sentence of their material used by Appellant. And even if Appellees furnished all of the research material it would not make them coauthors since it is the expresion of the ideas which makes an author, and not the ideas themselves.

Appellant never intended the works to be joint authorship works. He submitted the manuscript on March 11, 1980. Appellees edited the manuscript and made very minor changes on a few of the pages, mainly corrections of grammar, spelling, and punctuation. In Appellees's letter of May 6, 1980 Ms. Bakker, Appellees's editor, asked who should make some suggested changes. She presumed that Appellant wanted to do them so that he would not have to correct her work. Proof that Appellees had not done any coauthorship.

Appellant submitted the final manuscript on May 12, 1980. Prior to that there were no intention by either party that it was to be a coauthored work. Appellees did not add a single word to that manuscript before Appellant finished it and submitted it, and Appellees have not submitted any evidence of any claimed coauthorship before that date. Even if

there had been a subsequent agreement of coauthoship it could not have been a joint work (Nimmer § 6.02)

Appellees subsequently did mutilate Food Packaging by making unauthorized changes, which are the basis of some of Appellant's claims of copyright infringement, unfair competition, and breach of trust.

In the editing stage there were a number of oral and written communications between the parties, but never an agreement of coauthorship. However, even if it was an agreement the work would still not qualify as a joint work. It would have been a derivative (Nimmer § 6.05), and Appellees have never claimed such. When Appellant received a copy of the published version he strenuously objected to the mutilations of his work. Proof he never intended it to be a joint work.

The authorities relied on by Appellees

(Appendix R at 118) are not relevant to this case, which is governed by the 1976 Copyright Act, and neither is their argument citing the "12th Street Rag" case (Nimmer § 6.03).

Even if Appellees are correct that they changed 5 - 10% of Food Packaging they are not coauthors because most of the changes consist of deletions, which cannnot be copyrighted. For instance, Appellees deleted 29 of Appellant's 213 tables. The other changes are from copyrighted publications.

Except that the third contract, Retort, included finish typing, all the contracts were identical, including who owned the copyrights. At the hearing Appellees first claimed they were coauthors of all three book, but later admitted that they were not coauthors of Forming I and Retort, but they did not introduce any evidence that the Food

Packaging contract was different.

Appellees's mutilations are copyright infringements and not coauthorship (Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir 1976).

In all of their promotional literature and on the title page of Food Packaging Appellees are claiming Appellant as the only author.

Appellees did not claim coauthorship in their copyright application.

In the hearing before the Magistrate Smith neither Appellees nor Ms. Bakker claimed any coauthorship. Their claims were for supervision, and Magistrate Smith found the testimony of Appellees contradictory (Appendix H at 76). Appellees admitted that Appellant was responsible for the specifics of the job. The Magistrate at 77-78 did not find Ms. Bakker's testimony of her supervision persuasive, compelling, or creditable.

He believed her to be a good **editor** (emphasis added).

In Appellees's deposition (Appendix S) at 121-126 Appellees admit that Appellant is the author; that Ms. Bakker mostly wrote reports and was not involved with other writers; that she served as an editor and she did anything a good editor would do; and that it was company policy to put the name of the author or projct supervisor on the title page. Appellees stated that an individual listed as such did most of the work, most of the research, and **all** of the writing (emphasis added).

There are other reasons why Appellees are not joint owners. A joint owner may not grant exclusive licenses or exploit or alter the work so it is destroyed (Nimmer § 6.10). Appellees have expropiated the work for their exclusive use, and whether we accept Appellees's commer-

cial life of the works as one and a half, two and a half or ten years, Food Packaging is older than that and consequently it is destroyed by Appellees's use. Appellees have altered and mutilated Food Packaging to the extent that it is destroyed. A joint owner must account to the other owners because a constructive trust exist (Nimmer § 6.12). Appellees have never made any accounting or shared any profits with Appellant.

Question No. 2.

Did Defendants Infringe Plaintiff's Copyrights.

The Panel and the parties agreed that Question No. 2 should read: "If the answer to No. 1 above is "plaintiff," did defendants infringe plaintiff's copyright in P-049 and P-034R by the publication of P-049 and P-034R or any other publication?" The Panel on its own changed that to read: If the answer to 1 above is

"plaintiff," did defendants infringe plaintiff's copyrights in P-049 and P-034R by any other publication?" The Panel thus eliminated those two books from consideration as infringements. Yet the Panel in its determination of damages agreed that Appellees continued to publish (infringe) after the breaches. Appellees infringed in those two books and at least two others besides P-079.

It is uncontroverted that Appellees breached the contracts of both books on the first day of publication by not accounting for or paying royalties on books sold. For instance, a copy of Forming I was sold to Mitsubishi on January 29, 1980, the first day of its publication, but it was not reported on the royalty sheet. A copy of Food Packackaging was sold to Diamond International on July 31, 1980, the first day of its publication, but it was not reported on

the royalty sheet. (Appellant proved conclusively at the hearing that it is Appellees's standard operating procedure to cheat on the royalties of the first copy of each book sold). In addition Appellees cheated on other sales. For instance, copies of Food Packaging sold to Omega and Infotex were not reported on the royalty statement. A contract is breached when accounting of royalties omits a share of earnings (Nolan v. Williamson Music 300 F. Supp. 1311 (S.D.N.Y. 1969)). Appellees's continuing sales after the breach are infringements.

The Panel erred in ignoring the many breaches by Appellees, even though none of them were denied by Appellees, and in finding that the breaches of contract did not occur until November 26, 1980. However, Appellees continued to sell both books after November 26th, indeed, according to Appellees's records, more of

Food Packaging were sold after that date than before. There is no doubt that Appellees infringed both books. Appellees also infringed Food Packaging by their unauthorized changes (Gilliam v. American Broadcasting Companies, Inc. id)

Appellant presented evidence that Appellees had copied from Appellant's work in at least two other books, P-063 and P-071; that, although Appellees and Appellant apparently used the same sources, Appellant's material was substantially different from Appellees's; and that the authors of P-063 and P-071 copied from Appellant rather than from Appellees.

Appellant also introduced evidence that Appellees had copied in 60% of the books Appellant had been refused access to.

Question No. 3. If Plaintiff Did Not Own The Copyrights, Did Appellees Own

Them Under The For Hire" Doctrine

The Panel erred in its decision. It is an applicable issue, and the only factual issue agreed to by the parties (Appendix H at 63). It was never contested by Appellees, and consequently cannot be challenced at a later date (Abeshouse v. Ultragraphics Inc. id)It must be adhered to when no new facts are introduced (Yonkers Raceway Inc. v. Standardbred Assoc., Inc. id)

Question No. 4. If Defendants Owned Any Copyrights did Plaintiff Become the Owner Due to Defendants' Breach

The Panel erred and abused its discretion. The question certainly is applicable in view of the fact that Appellees breached the contracts; either as Appellant proved, on the first day of sales of each book; or on November 26, 1980 as the Panel determined. On one of these dates the copyright to Food Packaging belongs

to Appellant if it did not belong to him at creation.

Question No. 5. Did Defendants slander and or Libel Plaintiff.

The Panel's decision that Food Packaging was coauthored is erroneous as previously discussed. Appellees libeled Appellant by mutilating the work without permission. They went beyond their customary editing, and their editing is a far cry from the mutilated product they falsely attributed to Appellant's authorship. The right to change and edit is to mean what is customary in the trade (Edison v. Viva International, Ltd., 209 USPQ 345 (1979), 70 AD 2d 379.

Their original editing consisted mainly of grammatical corrections on the first 50 pages, nothing on the next 103 pages, then two minor corrections and nothing on the next 43 pages. This pattern continued for the rest of the

manuscript. Appellees's subsequent mutilations are slander of title and libel, which have hurt Appellant both emotionally and financially. It has hurt his reputation and standing as a professional author. Appellant have received numerous complaints, and Appellees have testified that they got complaints on Food Packaging because of the mutilations (Appendix S at 120-121).

Injury to ones professional reputation is libel (Gardella v. Log Cabin Products Co., 89 F.2d 891 (2d Cir 1987); Locke v. Benton & Bowles Inc., 1 NYS 2d 240 (1937)). Appellees credited the entire mutilated Food packaging to Appellant (despite their claim of coauthorship), and false attribution is libel, and special damages need not be proven because it prejudices ones livelihood (Ben-Oliel v. Press Publishing, Co., 167 NE 432 (N.Y. 1929).

Question No. 6. Did Defendants Engage in Unfair Competition

It is Uncontroverted that Appellees advertised two books, GA-053 and P-091, for more than five years (with newer publication dates) in competition with Appellant´s Retort, but without ever intending to publish such books, and for the sole purpose of drawing customers away from Appellant, whose sales dropped from 32 to 5 books a year. A deception so material as to affect the purchase decision is unfair trade (Blore v. 20/20 Advertising, 674 F. Supp. 671 (D. Minn. 1987); F Motor Co. v. B & H Supply, Inc., 646 F. Supp. 975 (D. Minn 1986)).

Other uncontroverted evidence shows that Appellees promoted and sold infringing books of which Appellant essentially was the author, but without crediting him as such, and thus damaging his professional status and ability to earn a

living. This is false attribution and reverse passing off, and a violation of the Lanham Act and unfair trade (Smith v. Montoro, 648 F. 2d 602 (9th Cir 1980). Appellees's mutilation of Food Packaging and their false attribution of Appellant as the sole author are equally unfair trade.

Question No. 7a. Are Defendants' Contributions Copyrightable?

The Panel erred with respect to P-034R in view of the evidence introduced. Appellees's contribution consist mainly of deletions, and as such do not qualify for copyright protection.

Question No. 9. Did Plaintiff Give up his Rights to Statutory Damages.

Appellant believes that the Panel abused its discretion in not ruling on this issue.

Appellees registered the books within the statutory period, and Appellant

contends that it does not matter who does the registering, even if some of the information on the application is incorrect. The purpose of early registration is to put the world on notice as to who owns the copyright, and not to punish innocent victims or create useless technicalities.

There has not been any decision on this issue by the Courts, but it is of such importance that it should be ruled on by the Supreme Court.

Question No. 12. Were Plaintiff and Defendants Joint Authors

Appellant is only challenging the Panel´s desicion on Appellant-034, and as Question No. 1 second part is essentially the same, the arguments presented there are relevant here.

Question No. 13. Appellees did Plaintiff Breach the Retort Contract?

Based on all the facts including the

oral arguments at the hearing it is clear that it was Appellees who breached the Retort contract, which is consistent with the Panel's finding that it was Appellees who breached the other contracts and engaged in the copyright infringements. Appellees have never argued the point and have only introduced one letter, which contradicts the other evidence.

Question No. 14. What Damages are Defendants Entitled to.

Appellant believes that Appellees is not entitled to any damages because of his arguments relating to the counterclaim and breach of the Retort contract, however, even if those are allowed to stand, the damages are still incorrect.

In response to the Court order of October 31, 1989, Appellees filed their total damage claim of $7896. This was based on their estimated sales of 25 books at $950. However, their prospec-

tus, introduced as evidence at the hearing, advertised the book for $725, bringing their gross profit down to $2271 -- substantially below the Panel's speculative figure of $3115.05. The Panel added publicity expenses of $3500 and $320.21 expenses paid. These are not additional expenses but part of the cost of every book and paid before the gross profit is determined. Both Appellees and the Panel also failed to account for the many books that sold at a discount. Based on Appellees's partial records, the discount would be $670 on 25 books. Appellees's original figure is also highly speculative because it is based on sales of 25 copies, but Appellees claim only 16 sold of Forming II. If they had sold 16 Retorts, they would have had a loss. Neither Appellees nor the Panel gave any reason why Appellees could expect to sell more than 50% more of Retort than Forming

II. In other words, Appellees is alternatively claiming sales of 25 and 30 copies of a book they never published but hope to collect damages on, and at the same time they claim they only sold 16 copies of a book on which they have to pay damages on. If they had believed they could publish Retort at a profit, they could have done so in a matter of weeks, especially since they claim to be coauthors and that it was a "work for hire". In either case they would have had the book in their possesion.

The figures are also highly speculative because they are unsupported by any testimony or evidence except their damage claims. Appellees filed the first one in compliance with the Court order of October 31, 1989 and introduced the second one at the Panel hearing. They are supposed to be identical, but Appellees tainted the second one by erasures and

additions and are now claiming that the sales should be 30 instead of 25 copies.

The figures are incorrect and speculative, and Appellant does not have to accept Appellees's unsupported data, especially since he has not been permitted to complete his discovery. It is up to Appellees to prove their figures (Alfred Bell Co. v. Catalda Fine Arts, 86 F. Supp. 309 (S.Appellees.N.Y. 1949)).

Question No. 15. Did Defendants Breach Any of the Contracts? When?

A and B Appellant believes the Panel erred in determining that the Forming I and Food Packaging contracts were breached on November 26, 1980. As discussed in Question No. 2, Appellees never contested that the breaches occurred on the date of publication and first sales of each book, and that they were repeated each time Appellees cheated on the royalties. Giving of false and untrue

reports and refusing Appellant access to the books is cause to rescind the contracts as such acts are material and willful breaches and a repudiation of the contracts or an essential part thereof, and such breaches substantially defeats the purpose of the contracts (Raferty v. World Film Corp., 167 N.Y.S. 1027 (1917)).

Appellant has discussed this issue in Question No. 13, and as the two questions are interdependent, he asks that the two be considered together.

Question No. 16. Did Defendants Cause Plaintiff Emotional Distress?

It is obvious that Appellees caused Appellant emotional distress. It is only natural that when a person's livelihood is severely curtailed that he suffers emotional distress. By the Panel's own determination, Appellees breached both contracts on November 26, 1980 and there-

after refused to pay any royalties. Royalties is the only income of a professional writer, and it is obvious that Appellant would be distressed. It is just as natural that Appellant suffered emotional distress when Appellees libeled Appellant as discussed in Question No.5, when Appellees committed their unfair competition against Appellant as discussed in Question No. 6. and when Appellees infringed on Appellant's works as discussed in Question No. 2. And they just as certainly caused Appellant emotional distress when they assaulted him during discovery. All the evidence is uncontroverted, and the Court erred, as a matter of law, in not setting aside the Panel's decision.

Question No.17. Were Defendants Acts Willful, Malicious, or in Bad Faith?

Appellant proved conclusively that Appellees always hide the first sale of

each book to cheat on the royalties as well as continually cheating on royalties of subsequent sales. This is willful, malicious, and in bad faith.

All of the evidence shows that Appellees never intended to carry out the contracts, and that is fraud (Prosser & Keton on Tort (5th Ed.) Chapter 16 at 664. Fraud is willful, malicious, and in bath faith.

The Panel determined that Appellees breached the P-034R and P-049 contracts on November 26, 1980, and even if Appellant had breached the Retort contract, it was bad faith for Appellees to breach the other two contracts. Appellees continued to sell the books after they breached the contracts and that can only be willful. Appellees advertising of non-existent Retorts for the sole purpose of driving Appellant out of business is definitely malicious.

Appellees cannot be innocent infringers if they have been notified that they are infringing. Appellant informed Appellees of the infringements on November 26, 1980 and at a meeting in October of 1982. Appellees even continued selling Food Packaging and published Forming II after the filing of this suit. And Appellees continued to promote the Books after the preliminary injunction. All of this is willful, malicious, and in bad faith.

The Panel's decision is inconsistent with its finding that Appellees breached the contracts, but that their sales after the breach are not willful.

In view of the conclusionary evidence, the Panel erred in not finding that Appellees's acts were willful, malicious, and in bad faith as a matter of law.

Question No. 18. Is Plaintiff Entitled to the Following Damages

A. Restitution. The issue is elective with Appellant, and the Panel abused its discretion in not allowing Appellant the choice. Appellant introduced evidence that Appellees profited from their acts above and beyond the compensatory damages suffered by him, and a wrongdoer must not profit from his evil deed.

C. Punitive Damages. Appellees's acts were willful, malicious, and in bad faith as discussed under Question No. 17; and as such Appellant is entitled to punitive damages (Crucible Inc. v. Stora Koppabergs Bergslags A.B., 10 USPQ 2d 1190 (W.Appellees.Pa. 1988); Hincliffe v. American Motors Corp., 184 Conn. 607 (1981)).

E. Costs Costs like attorney fees are awarded to the prevailing party on copyright claims. Both parties claimed the copyright to both books and Appellant claimed infringements. The Panel deter-

mined that Appellees infringed, that Appellant owned the copyright to one book, and that the other book was jointly owned.

The Panel´s decision that the the Retort contract was breached by Appellant is irrelevant in determining who is the prevalent party as that is not a copyright matter, but a contract matter for which costs are not awardable.

Appellant is clearly the prevalent party and as such is entitled to his costs. The award of costs is the rule rather than the exception (Weneha Music Co. v. Weathermon, 11 USPQ 2d 1395 (W.D.Mo. 1989)). Appellees´s obstruction of the case´s resolution, amply evidenced in Appellant´s brief for the Panel has increased Appellant´s cost beyond anything reasonable, for which Appellees should be held responsible (Fedtro v. Kravex Mfg. Corp., 313 F. Supp. 990

(E.D.N.Y. 1970)). The costs are to be allowed if Appellees's acts are willful (Whelan Assoc. v. Jaslow Dental Lab., Inc., 609 F.Supp. 1307 (D.C.Pa. 1985)). As discussed in Question No. 17 there is no doubt that Appellees's acts are willful, malicious, and in bad faith.

G. Injunction. Appellant is entitled to a permanent injunction. He presented evidence, as discussed in Question No. 17, that Appellees continued to infringe after the filing of this suit and after the issuing of a temporary injunction (confirmed by the Panel in its determination of the damages); and he presented evidence, as discussed in Question No. 6, that Appellees engaged in unfair competition. If the Court does not grant an injunction Appellees would continue their infringements and unfair trade, and Appellant would have no way of earning a living.

Appellees have never presented any evidence or argued against the issuing of a permanent injunction. A temporay injunction was issued on September 25, 1985 after a hearing before Magistrate Smith, and while it is not binding it should be adhered to unless new evidence or errors are found (Yonkers Raceway Inc. v. Standardbred Assoc., Inc. id). Appellees never objected to the merits of the injunction or appealed it, but they did file for a bond or dissolution, and the Court terminated the injunction when Appellant, due to Appellees's infringements and unfair competition, was unable to post the $1000 bond.

Question No. 19. Amount of Damages Due Plaintiff.

B. As discussed in Question No. 2, Appellees breached the contracts on the first day of publication of each book, however, the Panel determined that the

breach occurred on November 26, 1980, but in any event Appellees continued to promote and sell Forming I, Food Packaging, and Forming II after both dates. All of those sales are infringements and the damages cannot be determined by royalties on a past contract. The only time royalties can be used are for the period before the breaches, and then only if they are accurately reported.

Other damages due Appellant are those accruing after the breaches. Appellant's damages, Appellees's profits, Appellees's value of use, and Appellees' goodwill, all based on the facts (Business Trend Analyst, Inc. v. Freedonia Group, Inc. 887 F.2d 339 (2d Cir 1989)).

Appellant submitted a detailed analysis of the damages due him based on all the available evidence (much of it from Appellees's submissions). Appellees have not controverted any of it, it is the

only non-speculative information available, and it should be used for determining the damages.

D. The Panel's determination that only 25% of Forming II is attributable to Appellees's infringements is wrong. Almost all of Forming II came from Forming I (as is evident by looking at the tables of contents of both books). Forming II has the look and feel of Forming I, and it is essentially a condensed version of Forming I, the value of which has been destroyed by the publication of Forming II. If Appellees mixes his copyrightable work with the non-copyrightable so that it cannot be separated, they must answer for all their profits (Callaghan v. Myers, Sup Ct. Rep., 128 U.S. 617 (1888).

Part of Appellees's profits include goodwill and their use of the reports for research in writing other reports and

newsletters and presentation of seminars (Business Trend Analyst v. Freedonia Group, Inc. id). Appellees claimed those financial values in their Motion for Posting of Bond or Termination of Preliminary Injunction of May 14, 1987, at the hearing on that motion on December 1, 1987, and in Exhibit Y of their Memorandum of Law of April 2, 1991. Uncontroverted evidence and testimony by Appellees of profits are proper values to be used in determining the profits (Alfred Bell Co. v. Catalda Fine Arts id).

Appellees's expenses are not supported by any evidence and many of them are not allowable (Callaghan v. Myers id; Kamar International, Inc. v. Russ Berrie & Co., 752 F.2d 1326 (9th Cir 1984); Alfred Bell Co. v. Catalda Fine Arts id; Warner Bros. v. Gay Toys, Inc., 598 F. Supp. 424 (S.D.N.Y. 1984)) ; Johnson & Son, Inc. v. Drop Dead Co., 144 USPQ 257

(S.D.Cal. 1965)) Appellant cannot be expected to prove false or untendable Appellees's claims of expenses. It is up to Appellees to prove everything, and all doubts must be resolved in Appellant's favor (Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918 (2d Cir 1977); Alfred Bell & Co. v. Catalda Fine Arts id; Frank Music Corp. v. Metro Goldwyn Mayer Inc., 772 F.2d 505 (9th Cir 1985).

F. While in the past it was customary to use statutory interest rates, the current approach is to use actual rates compounded, as they more accurately reflects modern banking practices (Uniroyal Inc. v. Rudkin-Wiley Corp., 13 USPQ 2d 1192 (D. Conn. 1989); Johns-Manville Corp. v. Guardian Industries Corp., 13 USPQ 2d 1684 (E.D. Mich. 1989); Fromson v. Western Litho Plate & Supply Co. 13 USPQ 2d. 1856 (E.D. Mo. 1989)).

Appellant introduced evidence of the prime rates during the period in question, and as this was uncontroverted by Appellees, those rates should be used in calculating the interest.

Question No. 20. Did Defendants Breach Any Trust to Plaintiff

Appellees definitely breached their trust to Appellant. Appellees failed to account for or pay royalties from the very beginning and at various times thereafter. Appellees falsified their records to show sales of lesser amounts than received from their customers. Appellees mutilated Appellant's works. Appellees published derivatives without Appellant knowing it, to curtail sales of Appellant's works.

The Panel's determination that Appellees did not breach their trust and that Appellees are joint owners is illogical. A constructive trust exist in a joint

ownership (Nimmer § 6.12), and as the Panel determined, Appellees breached their contract in Food Packaging.

That Appellees breached their trust to Appellant is the only logical conclusion to be drawn from the evidence, and the Panel erred in reaching its conclusion.

Question No. 21. Are Defendants Entitled to Damages?

B. Appellant relies on his answer to Question No. 14, and asks the Court to take the same action as asked for in that question.

F. Appellees have never claimed any interest in their answers to the original or substituted complaint, their pleadings or their memorandum for the Panel.

Since they have not claimed any interest, they cannot possibly be entitled to it.

Question No. 22. Amount of Defendants' Damages

Appellant relies on his anwer to Question No. 21, and asks the Court to take the same action as in that question.

CONCLUSIONS

Appellant is respectfully asking that the Court grant a writ of certiorari because the Court below has ruled against the rulings of the Supreme Court, appellate courts in other districts, or the issues present important questions on federal law not previously decided. Appellant presents that:

The Mediation Panel's Decision is not binding when Appellant's conditions for binding mediation have not been met, the terms of the mediation is changed beyond the original agreement, the Panel fails to consider the preponderance of evidence, and Appellant has been denied due process.

The counterclaim is invalid because it

was filed after the statute of limitation, and alternatively because it was not filed in Appellees Answer to Substitued Complaint.

Appellees are not allowed to introduce new issues which change the thrust of the case.

Issues previously decided cannot be changed without new facts.

Respectfully submitted on January 2, 1992

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